Nos. 77-1835 and 77-1845

In the Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, PETITIONER

v.

BROOKHAVEN CABLE TV, INC., ET AL.

ROBERT E. KELLY, ET AL., PETITIONERS

v.

BROOKHAVEN CABLE TV, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (77-1845 Pet. App. 1a-8a) is reported at 573 F.2d 765. The opinion of the district court (*id.* at 9a-28a) is reported at 428 F. Supp. 1216.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1978. The petition for a writ of certiorari was filed in No. 77-1835 on June 26, 1978, and in No. 77-1845 on June 27, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Federal Communications Commission may preempt regulation by the states of pay cable television rates where state regulation conflicts with the Commission's objective of fostering growth of the pay cable television industry.

STATEMENT

1. In 1968 this Court sustained the Federal Communication Commission's jurisdiction to regulate cable television systems, and announced the standard governing the Commission's authority in this area. See *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968). *Southwestern Cable* held that the Commission's authority to regulate cable television includes regulation that is "reasonably ancillary to

the effective performance of the Commission's various responsibilities for the regulation of television broadcasting." *Id.* at 178.

One year later, the Commission took steps to extend the scope of cable television services by requiring certain cable television systems to originate nonbroadcast programs for their subscribers.[1] See *First Report and Order in Docket No. 18397*, 20 F.C.C. 2d 201 (1969). The Commission did not, however, attempt to prescribe the types of nonbroadcast programs or services that would be appropriate, preferring instead "to afford a period for free experimentation and innovation by the cable operators." 20 F.C.C. 2d at 214. Consistent with its policy favoring free innovation, the Commission determined that "state or local regulations or conditions inconsistent with these Federal regulatory policies are * * * preempted." 20 F.C.C. 2d at 223. See also, *In re Clarification of CATV, First Report as to Scope of Federal Preemption*, 20 F.C.C. 2d 741. (1969).

The Commission's mandatory origination rule was subsequently upheld by this Court in *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972). The Court concluded that the Commission's rule was within its jurisdiction because the rule furthered

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[1] *Southwestern Cable* had considered cable television systems used to "receive the signals of television broadcasting stations, amplify them, transmit them by cable or microwave, and ultimately distribute them by wire to the receivers of their subscribers." 392 U.S. at 161. The Court noted, however, that cable television systems were also capable of originating their own programs. *Id.* at 162 n.9.

"'the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public's choice of programs and types of services * * *.'" *Id.* at 667-668 (plurality opinion); see also, the concurring opinion of Mr. Chief Justice Burger at 676.

2. In 1972, the Commission promulgated additional rules governing cable television systems. The Commission adopted a "deliberately structured dualism," permitting state authorities to regulate the local incidents of cable television service while preempting regulation of subjects requiring uniform federal supervision. See *Cable Television Report and Order*, 36 F.C.C. 2d 143, 207 (1972). Specifically, the Commission permitted state authorities to regulate services "regularly furnished to all subscribers."[2] 36 F.C.C. 2d at 209. However, the Commission prohibited state regulation of cable television transmission of nonbroadcast programs.[3] 36 F.C.C. 2d at 193.

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[2] The states were permitted to regulate rates for the regular transmission of broadcast programs, as described in note 1, *supra*. State regulation of rates for these established services was deemed appropriate because such services had been in existence for 25 years and "accumulated experience" satisfied the Commission that state regulation would not thwart development. 36 F.C.C. 2d at 209.

[3] Subscribers pay special rates for access to those channels offering special nonbroadcast entertainment and educational programs or for the number of such programs transmitted. This service is designated "pay cable television." See 77-1845 Pet. App. 10a-11a.

In 1974, the Commission reiterated that the "regular subscriber services" that state authorities were permitted to regulate "[do] not include specialized [pay cable] programming for which a per-program or per-channel charge is made * * *. After considerable study of the emerging cable industry and its prospects for introducing new and innovative communications services, we have concluded that, at this time, there should be no regulation of rates for such services at all by any governmental level." *Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry in Dockets 20018 et al.*, 46 F.C.C. 2d 175, 199 (1974). The Commission added that "[n]o one has any firm idea about how any of these [pay cable] services will develop or how much they will cost," thus making it appropriate temporarily to preempt rate regulation and permit rates to adjust flexibly to reflect actual costs. Such flexibility would serve the purpose of encouraging new entry and development. *Id.* at 200. See also, *Report and Order in Docket 20272*, 54 F.C.C. 2d 855, 861-863 (1975); *Notice of Inquiry in Docket 20767*, 58 F.C.C. 2d 915, 915-916 (1976).

3. In March 1976, the New York State Commission on Cable Television (CCT), which had participated in the Commission proceedings cited above, issued an interpretation captioned *Clarification of Commission Policy* (77-1845 Pet. App. 35a-44a), requiring rates for pay cable television services to be set forth in municipal franchises and prohibiting rate changes without prior approval by both the municipal

authorities and CCT. In taking that position, CCT stated that it "fail[ed] to agree with the legality of the FCC's preemptive policy," and also questioned the "wisdom" of preemption. *Id.* at 42a. CCT declared that "active enforcement" of its rate regulation program would ensue. *Id.* at 44a.

Brookhaven Cable TV, Inc., one of the respondents herein, subsequently brought suit in the district court, seeking a declaration that CCT's announced rate regulation program conflicted with the Commission's determination and was void under the Supremacy Clause of the Constitution.[4] The district court granted summary judgment in favor of the plaintiffs, holding that the Commission had jurisdiction to preempt state regulation of pay cable television rates and that it had validly preempted state law in this respect (77-1845 Pet. App. 9a-31a). The court of appeals affirmed that ruling, noting that the Commission's preemption of rate regulations would allow the new industry to develop in a free market environment. The court concluded that the Commission's action was reasonably ancillary to the statutory objective of increasing program diversity and expanding the range of services available to viewers (77-1845 Pet. App. 4a). The court also found that the Commission's authority had been validly exercised through its various interpretative releases, and that petition-

[4] National Association of Regulatory Utility Commissioners (NARUC) intervened in the district court in support of the defendants. The Commission and the United States intervened in support of the plaintiffs.

ers had "ample opportunities to attempt to persuade the FCC to their point of view" (*id.* at 6a).

ARGUMENT

The decision of the court of appeals is consistent with this Court's decisions construing the Commission's authority to regulate cable television services, and it conflicts with no decision of any other court of appeals. Further review by this Court is unwarranted.

1. Petitioners contend that the Commission's authority to regulate cable television is not sufficiently broad to justify preemption of state rate regulation. Both petitioners agree that this Court's decisions in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and *United States* v. *Midwest Video Corp.*, 406 U.S. 649 (1972), provide the governing legal standards (77-1845 Pet. 12; 77-1835 Pet. 8). Analysis of those decisions demonstrates the propriety of the Commission's action here.

United States v. *Southwestern Cable Co.*, *supra*, 392 U.S. at 167-168, confirmed the Commission's authority to regulate cable television services, relying on Section 2(a) of the Communications Act of 1934, 47 U.S.C. 152(a), which provides in pertinent part: "The provisions of this [Act] shall apply to all interstate and foreign communication by wire or radio" (*id.* at 172-173). The Court noted that the statute gives the Commission " 'broad authority' " over cable television (*id.* at 168), based on its " 'reg-

ulatory power over all forms of electrical communication * * *'" (*id.* at 172). The Court stressed that this was a "'comprehensive mandate,' with 'not niggardly but expansive powers'" (*id.* at 173). This statutory delegation of authority provides a sufficient basis for regulatory action that is "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting" (*id.* at 178).

The breadth of the Commission's ancillary powers over cable television was confirmed in *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 662-670 (1972), which upheld the Commission's requirement that certain cable television systems originate programs. The Court held that the requirement was proper because it served to increase the number of outlets for community self-expression and expanded the public's choice of programs and services. These goals were "plainly within the Commission's mandate for the regulation of television broadcasting" (*id.* at 668), and could validly be pursued in the cable television medium (*id.* at 669). In his concurring opinion, Mr. Chief Justice Burger pointed out that although the regulation at issue was far reaching, the Commission has "generations of experience and 'feel' for the problem," and should be allowed "wide latitude" (*id.* at 676).[5]

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[5] See, also, *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, No. 76-1471 (June 12, 1978), slip op. 18-26, stressing the duty of the Commission to "promote the 'public interest' in diversification of the mass communications media." In pursuing that goal, the expert agency is "entitled to rely on its judgment, based on experience" (*id.* at 20), and judicial review is limited to the correction of "'arbitrary and capricious'" measures (*id.* at 26).

As the court below properly concluded (77-1845 Pet. App. 4a, 19a-24a), the Commission's decision to preempt state rate regulation of pay cable services was designed to serve the very objectives of increasing programming availability and program diversity that this Court held to be within the Commission's jurisdiction in *Southwestern Cable* and *Midwest Video.* Moreover, its preemption decision was a reasonable exercise of that jurisdiction. If, as this Court held in *Midwest Video*, the Commission can require cable systems to originate programs or provide other kinds of services, surely it has the power to prevent states from undermining its regulatory objectives by imposing price constraints that might stifle the development of the programming diversity the Commission seeks to promote.[6] Furthermore, in concluding that state rate regulation would have that effect, the Commission was "entitled to rely on its judgment, based on experience * * *." *Federal Communications Commission* v. *National Citizens Committee for Broadcasting*, *supra*, slip op. 20; *United States* v. *Midwest Video Corp.*, *supra*, 406 U.S. at 676.

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[6] Petitioners did not dispute in the courts below, and do not dispute in this Court, that the Commission's preemption policy will have the effect of encouraging the development of new services and new programming.

Petitioner in No. 77-1835 also errs in contending (Pet. 15-20) that the mere "intent of the agency" is insufficient to preempt state regulation. The Commission has made an express and unequivocal determination that rate regulation would be inconsistent with the federal objective of promoting pay cable services. Explicit determinations by federal administrative agencies, made within their regulatory jurisdiction, have the force of federal law. They may not be frustrated by inconsistent state laws. See, *e.g.*, *Free* v. *Bland*, 369 U.S. 663, 668-671 (1962); *Bethlehem Steel Co.* v. *New York State Labor Relations Board*, 330 U.S. 767, 774 (1947); *Ray* v. *Atlantic Richfield Co.*, No. 76-930 (March 6, 1978), slip op. 25. Otherwise, state law would stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" (*id.* at 5).

The fact that the federal agency has not undertaken affirmatively to regulate, but rather has determined that there shall be no regulation, is immaterial. As this Court held in *Bethlehem Steel Co.*, *supra*, 330 U.S. at 774, state action may be preempted "where failure of the federal officials affirmatively to exercise their full authority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute." In this case the Commission has expressly determined that "no such regulation is appropriate," and no inference about the matter is necessary. State authorities are no more free to countermand this express determination of the Commission than they would be to interfere with the

origination of programming required by the regulation upheld in *Midwest Video*.[7]

2. The lower court decisions cited by petitioners do not conflict with the ruling of the court of appeals. Petitioners candidly admit that the facts involved in the cases that they cite "are not directly relevant to the instant proceeding" (77-1835 Pet. 13), and the court of appeals properly distinguished them as inapposite (77-1845 Pet. App. 4a-5a).

In *Home Box Office, Inc.* v. *Federal Communications Commission*, 567 F.2d 9, 25-34 (D.C. Cir. 1977), the court remanded the case to the Commission for further consideration of various regulations affecting the cable television industry, noting that the Commission had failed to indicate what statutory objectives would be served by its regulations. The court also noted potential restraints on competition inherent in

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[7] *Head* v. *New Mexico Board*, 374 U.S. 424 (1963), and *T.V. Pix, Inc.* v. *Taylor*, 304 F. Supp. 459 (D. Nev. 1968), aff'd, 396 U.S. 556 (1970), are not to the contrary. In *Head*, this Court held that preemption would not be implied where the Commission's powers remained " 'dormant and unexercised' " and where "there has been no showing of any conflict between this state law and the federal regulatory system, or that the state law stands as an obstacle to the full effectiveness of the federal statute" (374 U.S. at 432). Here, of course, the Commission's powers have been exercised in the clearest possible manner, and no "implied" preemption issue arises. In *T.V. Pix*, the court specifically recognized that "[t]he need for the greatest flexibility commands the desirability of vesting in the Commission the power of Congress to preempt or not to preempt areas of control which might otherwise be invaded by the states" (304 F. Supp. at 465).

the regulations, which needed to be justified. *Id.* at 36-42. Neither question is presented here. *National Association of Regulatory Utility Commissioners* v. *Federal Communications Commission*, 533 F.2d 601, 614-616 (D.C. Cir. 1976), simply held that Commission regulation of private, non-video cable communications did not serve a valid statutory goal (such as enhancing program diversity), the court noting that "point to point communications * * * which involve one computer talking to another or a citizen calling his city counsel, have no relationship whatever" to traditional public broadcast concerns. Finally, in *Midwest Video Corp.* v. *Federal Communications Commission*, 571 F.2d 1025 (8th Cir. 1978), petitions for cert. pending, Nos. 77-1575, 1648 and 1662, the court of appeals invalidated the Commission's channel capacity and access regulations. Although we believe that the court erred in concluding that those regulations were beyond the Commission's jurisdiction,[8] the issues in that case bear little relation to the issue presented here. Whether the Commission has jurisdiction to require minimal channel capacity and to require operators to provide access to certain groups is quite different from the question whether the Commission, in furtherance of its objective of promoting pay cable services, may prohibit rate regulation by the states. There is therefore no need to

[8] See Brief for the United States in Nos. 77-1575, 1648, and 1662 at 8-12. We are furnishing copies of that brief to petitioners.

defer decision on this case pending disposition of the petitions in that case.

3. Petitioners in No. 77-1845 also argue that the Commission failed to give them a "direct opportunity" to raise their objections to preemption (Pet. 17-18).

As the court of appeals specifically found, petitioners "participated in the 1974 [Commission] proceedings cited above, and had ample opportunities to attempt to persuade the FCC to their point of view—which they did [attempt to do]—and to take an appeal when they failed—which they did not" (77-1845 Pet. App. 6a). In fact, petitioners had several opportunities to raise their "objections" to preemption. In 1970, the Commission advised the public of proposed rulemaking and held hearings to determine which aspects of cable television regulation should be left to the states. *Notice of Proposed Rulemaking in Docket 18892*, 25 F.C.C. 2d 50, 51-53 (1970). Subsequently, in a rulemaking proceeding captioned *First Report and Order in Docket 19554*, 52 F.C.C. 2d 1 (1975), CCT filed written comments with the Commission and participated in hearings in which it asserted its view that it should retain authority to regulate pay cable rates. Hearing Transcript, November 7, 1973, Vol. 3, at 609-620. Both petitioners filed comments in the Commission's hearing on duplicative and excessive regulation of cable television, *Report and Order in Docket 20272*, 54 F.C.C. 2d 855, 856 n. 4 (1975), and petitioners participated in other proceedings before the Commission dealing with state

and federal authority over cable television and opposed preemption of state control.[9]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[9] See, *e.g.*, *Report and Order in Docket 20020*, 50 F.C.C. 2d 61, 63-64 (1974); *Report and Order in Docket 20021*, 50 F.C.C. 2d 761, 767 (1975); *Report and Order in Docket 20024*, 50 F.C.C. 2d 43, 45 (1974). See also *Report and Order in Docket 20018*, 49 F.C.C. 2d 470, 472-474 (1974).

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